

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VERITAS OPERATING CORPORATION, a
Delaware corporation,

Plaintiff,

v.

MICROSOFT CORPORATION, a Washington
corporation,

Defendant.

CASE NO. C06-0703-JCC

ORDER

MICROSOFT CORPORATION, a Washington
corporation,

Counterclaim Plaintiff,

v.

VERITAS OPERATING CORPORATION, a
Delaware corporation, and VERITAS
SOFTWARE CORPORATION, a Delaware
corporation,

Counterclaim Defendants.

1 This matter comes before the Court on Defendant/Counterclaim Plaintiff Microsoft Corporation
 2 (Microsoft)'s Motion for Summary Judgment on Counts I, III-V, VII (Dkt. No. 212), Veritas Operating
 3 Corporation (Veritas)'s Response opposing the motion (Dkt. No. 289), and Microsoft's Reply (Dkt. No.
 4 332). The Court has carefully considered these papers and their supporting declarations and exhibits and
 5 has determined that oral argument is not necessary. The Court hereby GRANTS IN PART and DENIES
 6 IN PART the motion and rules as follows.

7 **I. BACKGROUND**

8 The facts pertinent to this motion overlap with those summarized in the Court's Order of January
 9 24, 2008 (Dkt. No. 398). Accordingly, the Court will not recount them here except as necessary to
 10 explain its decision.

11 **II. APPLICABLE STANDARD**

12 Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file,
 13 and any affidavits show that there is no genuine issue as to any material fact and that the movant is
 14 entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "A 'material' fact is one that is relevant to
 15 an element of a claim or defense and whose existence might affect the outcome of the suit." *T.W. Elec.*
 16 *Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The moving party bears
 17 the initial burden of showing that no genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v.*
 18 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If the moving party meets this initial burden, then the
 19 party opposing the motion must set forth facts showing that there is a genuine issue for trial. See *T.W.*
 20 *Elec. Serv., Inc.*, 809 F.2d at 630. The party opposing the motion must "do more than simply show that
 21 there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586.
 22 "In response to a summary judgment motion, . . . the plaintiff can no longer rest on . . . mere allegations,
 23 but must set forth by affidavit or other evidence specific facts, . . . which for the purposes of the summary
 24 judgment motion will be taken to be true." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992);
 25 FED. R. CIV. P. 56(e). If the nonmoving party fails to establish the existence of a genuine issue of material

fact, “the moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

III. ANALYSIS

A. Trade Secret Misappropriation

Microsoft seeks to dismiss Veritas’ claim of trade secret misappropriation¹ under the Washington Uniform Trade Secrets Act (“WUTSA”), WASH. REV. CODE § 19.108.010, *et seq.*, on grounds that: 1) Microsoft’s actions were entirely consistent with its contractual obligations regarding Veritas’ confidential information, and therefore, Microsoft could not have engaged in trade secret misappropriation; 2) the allegedly misappropriated information is not a “trade secret” under WUTSA; and 3) Washington’s Economic Loss Rule precludes Veritas from bringing its trade secret misappropriation claim because the parties contracted for remedies in the event of a breach of the obligation not to disclose confidential information. (Def.’s Mot. 4–10 (Dkt. No. 212 at 5–11).) The Court is not persuaded, at this stage, by any of these arguments.

1. Whether Microsoft’s Actions Were Within the Scope of Its Original Licenses or Its Rights under the April 2004 Buy-Out

The Court has already found that it is unclear at this stage whether Microsoft developed Logical Volume Manager (LVM), Virtual Disk Service (VDS) and Volume Shadow Copy Service (VSS) in

¹ Veritas claims that Microsoft:

improperly used and publicly disclosed certain Veritas trade secrets that Veritas had disclosed to Microsoft in accordance with the Agreement. Microsoft used Veritas trade secrets in order to develop and include in Windows NT and subsequent operating system products certain features that were reserved exclusively to Veritas under the Agreement. Microsoft also misappropriated Veritas trade secret information by using such information to create and incorporate LVM, VDS and VSS into Microsoft’s operating system products. Microsoft also improperly used and publicly disclosed certain Veritas trade secrets by incorporating them into the patent applications that issued as the Microsoft Patents.

(Compl. ¶ 56 (Dkt. No.1 at 21).)

1 accordance with Microsoft's contractual obligations, in light of the Agreement's arguable restrictions on
 2 Microsoft's use of Veritas' confidential information. (Order of Jan. 24, 2008 (Dkt. No. 398).) Whether
 3 LVM, VDS and VSS contain or were designed with the use of Veritas' confidential information hinges
 4 on a highly technical examination of code and requires the weighing of expert testimony. Because the
 5 Court cannot rule on summary judgment whether Microsoft breached the Agreement, the Court cannot
 6 determine whether a lack of breach indicates that Microsoft did not engage in trade secret
 7 misappropriation in developing LVM, VDS and VSS.

8 **2. Whether the Alleged Misappropriations Involve "Trade Secrets"**

9 To succeed on its trade secret claim, Veritas must prove the existence of a "trade secret" within
 10 the statutory definition. A "trade secret" is:

11 information, including a formula, pattern, compilation, program, device, method,
 12 technique, or process that: (a) Derives independent economic value, actual or potential,
 13 from not being generally known to, and not being readily ascertainable by proper means
 14 by, other persons who can obtain economic value from its disclosure or use; and (b) Is the
 15 subject of efforts that are reasonable under the circumstances to maintain its secrecy.

16 WASH. REV. CODE § 19.108.010(4). The Complaint does not specify precisely which trade secrets
 17 allegedly were used to create and incorporate LVM, VDS and VSS into Microsoft's operating systems.
 18 However, Microsoft focuses on the "common interface" technology of the VDS and VSS products and
 19 argues that the allegedly misappropriated source code constituting such technology in VDS and VSS
 20 was generally known and was readily ascertainable by proper means (i.e., not novel). (Def.'s Mot. 7 (Dkt.
 21 No. 212 at 8).) Further, according to Microsoft, Veritas did not engage in reasonable efforts to keep such
 22 information confidential. (*Id.*) Moreover, Microsoft argues, there are no other possible trade secrets in
 23 VSS or VDS beyond the common interface technology. (Def.'s Mot. 9 (Dkt. No. 212 at 10).)

24 Veritas argues that the LDM source code contains numerous trade secrets that have never been
 25 publicized by Veritas and that have been misappropriated by Microsoft. (Pl.'s Resp. 9 (Dkt. No. 289 at
 26 15).) In particular, Veritas points to its supplemental answers to Microsoft's First Set of Interrogatories,
 27 in which Veritas identifies twenty-five algorithms and code sequences that it argues qualify as confidential

1 information that Microsoft allegedly used in developing LVM. (Supplemental Answer to Interrog. No. 4
2 (Dkt. No. 293-3 at 10–15).) Furthermore, Veritas argues, Microsoft’s motion mischaracterizes Veritas’
3 trade secret claims; Veritas is not arguing that the “common interface” feature of the VDS and VSS
4 products are trade secrets. (Pl.’s Mot. 11 (Dkt. No. 289 at 17).) Rather, Veritas’ claim against the
5 VDS/VSS framework is that Microsoft’s use of Veritas’ *proprietary* and *private* interfaces and related
6 confidential information in the development of VDS and VSS was a misappropriation and competes with
7 Veritas’ Add-on products. (Pl.’s Resp. 11 (Dkt. No. 289 at 17).) Veritas supports this claim with the
8 expert testimony of Dr. Jeffrey Chase, a Computer Science Professor at Duke University, who states in
9 part that the VSS/VDS code “makes some use of Veritas’ proprietary on-disk structure and proprietary
10 interfaces for manipulating such structures.” (Chase Report at ¶ 19 (Dkt. No. 296-3 at 13).) Dr. Chase
11 also states that “the implementation of these interfaces [in VSS] access functions from LDM, and
12 exposed those functions as a programmatic management API for a product that competes with Veritas
13 add-on products.” (*Id.* ¶ 163 (Dkt. No. 296-3 at 90).) Dr. Chase’s report contains some technical analysis
14 supporting Veritas’ claim that VSS code and VDS code were developed using confidential LDM source
15 code information. (Dkt. No. 296-3 at 89–95).)

16 The Court is not persuaded at this stage by Microsoft’s arguments regarding the absence of trade
17 secrets in LVM, VSS, and VDS. Because Veritas does not claim that the common interface technology
18 of VDS and VSS is protected by trade secret law, the Court sees no need to address Microsoft’s specific
19 arguments regarding the alleged lack of novelty or publication of that technology. Additionally, based on
20 the expert testimony that Veritas has put forward to substantiate its claims that VDS and VSS do contain
21 trade secrets, the Court finds that genuine issues of material fact exist. The Court is not persuaded by
22 Microsoft’s argument that neither VDS nor VSS contains any possible Veritas trade secrets other than
23 the concept of a common interface, since Veritas has provided sufficient evidence to withstand summary
24 judgment that Veritas’ private interfaces and other information in LDM were trade secrets. Moreover,
25 “the determination in a given case whether specific information is a trade secret is a factual question.” *Ed*

1 *Nowogroski Ins., Inc. v. Rucker*, 971 P.2d 936, 941 (Wash. 1999). The Court finds that whether the
 2 private interfaces and other information were trade secrets is properly left for the jury to decide.

3 **3. Whether Veritas' Statutory Trade Secret Misappropriation Claim Is Barred
 by the Economic Loss Rule**

4 Microsoft argues that, regardless of the merits of the misappropriation issue, Veritas cannot bring
 5 both breach of contract and trade secret misappropriation claims for economic loss because under
 6 Washington law, the so-called “economic loss rule” precludes recovery for losses that are redressable by
 7 contract remedies. (Def.’s Mot. 10 (Dkt. No. 212 at 11).) The Court is not persuaded that the economic
 8 loss rule applies here.

9 Under Washington law, the economic loss rule sometimes applies:

10 to hold parties to their contract remedies when a loss potentially implicates both tort and
 11 contract relief. . . . The rule prohibits plaintiffs from recovering in tort economic losses to
 12 which their entitlement flows only from contract because tort law is not intended to
 13 compensate parties for losses suffered as a result of a breach of duties assumed only by
 14 agreement.

15 *Alejandro v. Bull*, 153 P.3d 864, 867–68 (Wash. 2007) (internal quotations omitted). The rule generally
 16 provides that “when the damages complained of are ‘purely economic’ (that is, there is no property
 17 damage or personal injury), and the parties either allocated the risk of loss between them, or had the
 18 opportunity to do so, the plaintiff is limited to contract remedies rather than tort remedies.” 16 DAVID K.
 19 DEWOLF & KELLER W. ALLEN, WASH. PRAC., TORT LAW AND PRACTICE § 0.16 (3d ed. 2007) (citing
 20 *Alejandro*, 153 P.3d at 864).

21 However, “the economic loss rule does not automatically preclude all tort claims simply because a
 22 contract existed between the parties.” *Davis v. Wells Fargo Home Mortgage*, No. 34136-1-II, 2007 WL
 23 2039077, at *4 (Wash. Ct. App. July 17, 2007). The Washington Court of Appeals has explained that the
 24 judicially created economic loss rule:
 25

26 evolved in [an arena] in which the legislature had not spoken. Where the legislature has
 27 acted to create rights and remedies, courts cannot enlarge or restrict those rights or
 28 remedies unless the statute is unclear and we are confident our interpretation is consistent
 29 with legislative intent.

Park Ave. Condo. Owners Ass'n. v. Buchan Devs., LLC, 71 P.3d 692, 698 (Wash. Ct. App. 2003); see also, e.g., *Ruebel v. Camano Island Realty, Inc.*, No. 58533-9-I, 2007 WL 2823285, at *7 n.8 (Wash. Ct. App. Oct. 1, 2007) (noting that where a statutory-based remedy allowed a plaintiff to recover damages, the economic loss rule did not apply).

The Court has not found any Washington cases explicitly addressing whether the economic loss rule may apply to bar a statutory trade secret misappropriation claim; however, the Court agrees with the sound reasoning of at least one other jurisdiction that has held that the rule does not bar such a claim. *See New Lenox Indus., Inc. v. Fenton*, 510 F.Supp. 2d 893, 909 (M.D. Fla. 2007) (holding that a FUTSA claim was not barred by the economic loss rule, even though the claim was indistinguishable from a breach of contract claim, because under Florida law, the economic loss rule does not bar statutory causes of action). The Washington cases cited above suggest that similarly, under Washington law, the economic loss rule would not bar Plaintiff's statutory WUTSA claim. Accordingly, the Court will not dismiss Plaintiff's trade secret misappropriation claim on this basis.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing

Microsoft argues that Veritas' claim for breach of the implied covenant of good faith and fair dealing² is precluded for two reasons: 1) the claim merely duplicates Veritas' breach of contract claim; and 2) Veritas fails to allege a failure to act in good faith. (Def.'s Mot. 11 (Dkt. No. 212 at 12).)

The Court is unpersuaded by Microsoft’s arguments because Veritas not only claims that Microsoft breached its contractual obligations but also that it did so surreptitiously, with a deliberate intention to mislead Veritas and thereby deny Veritas the benefit of its bargain. (Compl. ¶ 1, 36, 37 (Dkt. No. 1).) In its Response, Veritas provides some evidence that Microsoft intentionally breached the Agreement and that “Microsoft engaged in a concerted, multi-year effort to conceal its unlawful actions

² Under Washington law, “[t]here is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.” *Badgett v. Sec. State Bank*, 807 P.2d 356, 360 (Wash. 1991).

1 on multiple fronts by withholding critical evidence of its misconduct from Veritas.” (Pl.’s Resp. 17 n.73
 2 (Dkt. No. 289 at 23).) For example, a 1998 email from Microsoft’s Kevin Phaup states that Felipe
 3 Cabrera, one of Microsoft’s managers of the LDM project:

4 admitted that his intention is to eventually get [Veritas] out of the box because he believes
 5 we should not rely on any 3rd party for core components. . . . He also says he doesn’t care
 6 a damn about the contract because he wasn’t involved, and we should just lie to them that
 7 we are doing this for performance reasons[.]

8 (Phaup Email Jan. 15, 1998 (Dkt. No. 296 at 5).) In another example, a 2001 email from Microsoft’s
 9 general manager Ben Fathi states that “[w]e should be clear amongst ourselves that Veritas is a
 10 competitor. We will work with them as opportunities arise, but opening our kimono is out of the
 11 question.” (Fathi Email Feb. 19, 2001 (Dkt. No. 296 at 76).)

12 Additionally, some evidence supports Veritas’ allegation that Microsoft deliberately included
 13 “blocking” code to conceal its inclusion in LVM of certain features that may have been reserved for
 14 Veritas’ Add-on Products. (Chase Report ¶ 79–82 (Dkt. No. 296-3 at 50–51); Teodorescu Dep.
 15 37:11–38:2 (Dkt. No. 296 at 116–17).) Moreover, Veritas offers some evidence that Microsoft denied
 16 Veritas access to design documents and version histories for VSS and VDS, in an attempt to conceal its
 17 contractual breaches. For example, one of the LVM design documents includes information regarding the
 18 inclusion and blocking of certain features arguably reserved for Veritas Add-on Products, and states that
 19 the document “should not be disclosed to any vendor (including Veritas) at this time.” (Microsoft
 20 Document “Volmgmt Driver” (Dkt. No. 296-2 at 2).) In addition, a 2002 email from Veritas’ Eric
 21 Burneger memorializes that Veritas repeatedly asked Microsoft for, and was denied, access to source
 22 code for what would become Windows 2003 Server, which was to include LDM code. (Burgener Email
 23 Oct. 7, 2002 (Dkt. No. 293 at 4).) Under the Agreement, Microsoft was obligated to provide Veritas
 24 with modified source code so that Veritas could maintain compatibility with its Add-on Products.
 25 (Agreement § 3.5 (Dkt. No. 211-2 at 7).) Building an Add-On Products business was Veritas’ express
 26 objective in entering the Agreement in the first place. (Agreement Recitals (Dkt. No. 211-2 at 2).)

Veritas has raised at least a genuine issue of material fact as to whether Microsoft breached the implied duty of good faith and fair dealing. Moreover, the Court will not hold the economic loss rule to bar a claim for breach of the implied duty of good faith and fair dealing. It would defy logic to find that this type of claim is precluded by the existence of a contract, given the fact that Washington law clearly recognizes the duty and requires the existence of a valid contract in order for it to apply. *See Badgett*, 807 P.2d at 360 (“The duty to cooperate exists only in relation to performance of a specific contract term.”).

C. Unfair Competition

Microsoft argues that Veritas cannot prove its unfair competition claim because there is no evidence that Microsoft deceptively “passed off” Veritas’ products as its own. (Def.’s Mot. 13 (Dkt. No. 212 at 14).) Veritas’ common law unfair competition claim is based not on “passing off,” however, but rather on allegations that Microsoft: (1) included features in its operating system products that are exclusively reserved for Veritas under the Agreement; (2) failed to provide Veritas with information and code updates; and (3) failed to comply with its contractual obligations to respect the confidentiality of Veritas’ trade secret and confidential information.³ (Compl. ¶ 70 (Dkt. No. 1).)

Veritas has not identified, nor has the Court found, controlling precedent under Washington law upholding a common law unfair competition claim based, like Plaintiff’s claim, on breach of contract.⁴ The most relevant authority that this Court has found is a footnote in a 1973 Washington Supreme Court case stating that “[t]here can also, at common law, be an action for unfair competition based upon breach

³ Contrary to Microsoft’s assertion that only the first two allegations remained after this Court’s October 31, 2006, Order (Dkt. No. 60), the Order dismissed only that portion of the unfair competition claim regarding “other obligations.”

⁴ The common law regarding unfair competition for misappropriation of a trade secret has been displaced by WUTSA. WASH. REV. CODE § 19.108.900(1); *Petters v. Williamson & Assoc., Inc.*, No. 49236-5-I, 2003 WL 457823, at *11 (Wash. Ct. App. 2003) (affirming dismissal of a misappropriation-based common law unfair competition claim as not appropriate as an independent basis for liability).

1 of contract.” *Seaboard Sur. Co. v. Ralph Williams’ Nw. Chrysler Plymouth, Inc.*, 504 P.2d 1139, 1141
 2 n.2 (Wash. 1973). Additionally, in an unreported Washington Court of Appeals opinion, the court held
 3 that a breach of contract claim was sufficient to support a common law unfair competition claim, and
 4 pointed to the Restatement (Third) of Unfair Competition, Section 38, for the proposition that “[o]ne
 5 who causes harm to the commercial relations of another by appropriating the other’s intangible trade
 6 values is subject to the other for such harm only if: . . . (c) the appropriation . . . is actionable as a breach
 7 of contract[.]” *Wade Cook Seminars, Inc. v. Mellon*, No. 42054-2-I, 1999 WL 211831, at *5 (Wash. Ct.
 8 App. Apr. 12, 1999).

9 Microsoft, by contrast, points to an unreported order in this district that finds that under
 10 Washington law, “common law unfair business competition claims are limited to what was referred to in
 11 England as claims for ‘passing off.’” *Childers v. Sagem Morpho, Inc.*, No. C06-0060, 2006 WL
 12 3734151, at *5 (W.D. Wash. Dec. 15, 2006) (citing *Ivan’s Tire Serv. Store, Inc. v. Goodyear Tire &*
 13 *Rubber Co.*, 517 P.2d 229, 122 (Wash. Ct. App. 1974) (describing the common law concept of unfair
 14 competition as “passing off” one’s goods as those of a competitor)). In such a case, the damages that
 15 could be recovered included:

16 lost profits, losses due to reduction in prices occasioned by the competition, harm to
 17 reputation, and expenditures reasonably made by the plaintiff to prevent prospective
 customers from being misled by the defendant’s conduct.

18 *Ivan’s Tire Serv. Store, Inc. v. Goodyear Tire & Rubber Co.*, 517 P.2d 229, 126 (Wash. Ct. App. 1974).
 19 Veritas makes no allegation that it has suffered these kinds of damages from “passing off.”

20 It is not entirely clear how Veritas articulates and supports its unfair competition claim. Other
 21 than identifying the breach of contract-related unfair competition claims in its Complaint, Veritas
 22 addresses its unfair competition claim only to the extent that it opposes Microsoft’s argument that the
 23 economic loss rule precludes the tort claim. (Pl.’s Resp. 29 (Dkt. No. 289 at 35).) Veritas states that
 24 Washington recognizes the common law tort of unfair competition to “guard the standards of fairness and
 25 morality in commercial transactions,” but refers the Court only generally to the Restatement (Third) of
 26 ORDER – 10

1 Unfair Competition for guidance in construing the claim. (Pl.’s Resp. 29–30 (Dkt. No. 289 at 35–36).) It
 2 does not appear that Veritas is claiming that Microsoft “passed off” Microsoft’s goods as those of
 3 Veritas. Rather, Veritas explains that its claim is based upon Microsoft’s purposeful deception in
 4 breaching its contractual obligations. (Pl.’s Resp. 30 (Dkt. No. 289 at 36).) Veritas states that “[e]ven
 5 sophisticated parties to a commercial contract have the right to expect the other party to act in good
 6 faith[.]” However, Veritas already has the potential to recover for such an alleged wrong under its claim
 7 for breach of the duty of good faith and fair dealing. Lacking clear substantive Washington case law on
 8 breach of contract-based common law unfair competition claims, and finding Veritas’ explanation of its
 9 claims somewhat vague and duplicative of its breach of good faith duty claim, the Court hereby
 10 DISMISSES Veritas’ unfair competition claim.

11 **D. Unjust Enrichment**

12 In its Response, Veritas states that it will “not go forward on the unjust enrichment claim as a
 13 separate cause of action.” (Pl.’s Resp. 30 n.112 (Dkt. No. 289 at 36).) Accordingly, the Court
 14 DISMISSES Veritas’ unjust enrichment claim.

15 **E. Copyright Infringement**

16 Veritas claims that Microsoft:

17 infringed Veritas’s Registered Copyright Nos. TXU1272637 and TXU1272638 by
 18 developing, copying, making, using, offering for sale or selling various operating systems
 19 products incorporating LVM. . . . LVM contains code segments that constitute copies of
 20 portions of Veritas’s copyrighted code.

21 (Compl. ¶ 84 (Dkt. No. 1).) Apparently, the only portion of the LDM code that Veritas has specifically
 22 identified as having been infringed⁵ consists of 54 lines of code, comprising approximately 0.03 percent of
 23 a code base of almost 160,000 lines. (Def.’s Mot. 25 (Dkt. No. 212 at 26).) With the possible exception
 24 of two lines, Microsoft did not copy verbatim this code section; rather, Microsoft changed the code “by

25 ⁵ Veritas identified the allegedly infringed code portion in its Third Supplemental Answers to
 26 Microsoft’s First Set of Interrogatories (Dkt. No. 213-2 at 37–38). Due to its complexity, the Court will
 not reproduce the code portion here.

1 removing the legacy UNIX programming conventions and by upgrading the programming language to
 2 C++ from the older C language in which Veritas wrote it[.]” (Def.’s Mot. 25 (Dkt. No. 212 at 26).)

3 Microsoft argues that Veritas’ copyright claim cannot survive summary judgment because
 4 Microsoft was licensed to use the code and, after the 2004 “buy-out,” was effectively the owner of the
 5 code. (Def.’s Mot. 24 (Dkt. No. 212 at 25).) Additionally, according to Microsoft, the code section
 6 identified by Veritas is not protected by copyright law because it is functional, in the public domain, and
 7 *de minimis*. (Def.’s Mot. 25 (Dkt. No. 212 at 26).) Microsoft also argues that Veritas has not put forth
 8 evidence demonstrating that the two code sections are substantially similar. (Def.’s Mot. 27 (Dkt. No.
 9 212 at 28).) Finally, Microsoft argues that Veritas’ copyright claim is untimely.⁶ (Def.’s Mot. 30 (Dkt.
 10 No. 212 at 31).) Each of these arguments is addressed in turn, below.

11 **1. Whether Microsoft is Licensed to Use the Code or Is Its Effective Owner**

12 Microsoft concedes that when a party exceeds the scope of a license, it can be held liable for
 13 copyright infringement. (Def.’s Mot. 25 (Dkt. No. 212 at 26) (citing *Sun Microsys., Inc. v. Microsoft*
 14 *Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999)).) The Court has already found that whether or not
 15 Microsoft’s actions were within the scope of the Agreement is a fact question that remains for the jury.
 16 Accordingly, it will not grant Microsoft’s motion for summary dismissal of the copyright claim on this
 17 basis.

18 **2. Whether the Code at Issue is Protected by Copyright Law**

19 To succeed on its copyright infringement claim, Veritas will have to prove that Microsoft “copied
 20 protected elements of [Veritas’] work.” *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir.
 21 2000), *cert. denied*, 531 U.S. 1126 (2000). Absent direct evidence of copying, such as an admission that
 22 defendant copied the work at issue, this factor is normally proven by circumstantial evidence of
 23 defendant’s access to plaintiff’s work and substantial similarity between the works. *Id.* Before the Court

25 ⁶ The Court addresses the timeliness issue in Section III.F below.

1 reaches the substantial similarity analysis, however, the Court must first filter out any non-protected
 2 material from the purportedly protected expression. *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 982 F.2d
 3 693, 710 (2d Cir. 1992). As to whatever “golden nugget” of protected expression in the LDM code
 4 remains, the Court will then consider whether it is substantially similar to the allegedly infringing LVM
 5 code. *Id.*

6 **i. Non-Protected Elements**

7 The section of code allegedly infringed, by both parties’ accounts, is a “transaction macro.”
 8 (Def.’s Mot. 26 (Dkt. No. 212 at 27), Pl.’s Resp. 26 (Dkt. No. 289 at 32).) Veritas’ expert Dr. Chase
 9 describes transaction processing as a “transactional update and recovery in the implementation of
 10 configuration changes to disk groups or packs.” (Chase Report ¶ 102 (Dkt. No. 296-3 at 61).) As best
 11 the Court can determine, the transaction macro essentially works to preserve data and prevent its loss in
 12 the event of a range of hardware or software failures. Dr. Chase opines that “[t]his core code to store,
 13 update, and recover disk group configurations safely is crucial to the value of the software in an
 14 enterprise setting.” (*Id.*)

15 Under copyright law, even as to software code, “functional elements and elements taken from the
 16 public domain do not qualify for copyright protection.” *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 982
 17 F.2d 693, 714 (2d Cir. 1992). Microsoft argues that the transaction macro was “required to maintain
 18 functionality with the Defined Interface, as required by the Agreement,” and as such, constitutes a
 19 functional, non-protected element of the allegedly infringed work. (Def.’s Mot. 26 (Dkt. No. 212 at 27).)
 20 However, Veritas’ expert Dr. Chase states that copying the transaction macro “was not necessary to
 21 maintain compatibility with the LDM on-disk structures.” (Chase Report ¶ 96 (Dkt. No. 296-3).) As a
 22 result, whether the transaction macro is a functional element is a disputed material fact.

23 Additionally, Microsoft argues that similar transaction macros have been in the public domain for
 24 decades, and that therefore the transaction macro at issue is not protected by copyright. (Def.’s Mot. 26
 25 (Dkt. No. 212 at 27).) Veritas’ expert, however, has stated that the transaction macro was a proprietary
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1 feature that was developed by Veritas over many years. (Chase Report ¶ 103 (Dkt. No. 296-3 at 62).)
 2 Even Microsoft's expert, Dr. Gary Nutt, recognizes that the transaction macro is crucial to the value of
 3 the product and stated that he was not aware of the publication of the macro:

4 Q: I am asking you whether you are aware of any publication by Veritas or anyone
 5 else of the unique implementation details associated with the transactions
 6 technology in LDM?
 7 . . .

8 A: I would repeat that I am unaware of any source code being published, any of
 9 Veritas' LDM source code appearing in publication.

10 (Nutt Dep. 51:3–13, 145:4–7 (Dkt. No. 296-4 at 15, 41).) It may be that similar transaction macros were
 11 common in computer science, as Microsoft contends, (Def.'s Mot. 26 (Dkt. No. 212 at 27)), but there is
 12 at least a genuine issue of material fact on this issue.

13 Finally, Microsoft's argument that the alleged copying is *de minimis* is unpersuasive:

14 [E]ven a quantitatively small amount of copied material may be sufficiently important to
 15 the operation of plaintiff's program to justify a finding of substantial similarity. For
 16 instance, a small portion of the structure or code of a program may nonetheless give it
 17 distinctive features or may make the program especially creative or desirable. In such a
 18 case, a finding of substantial similarity would be appropriate.

19 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03(F)(5). In the instant case, as
 20 noted above, Veritas' expert has opined that the transaction macro at issue makes the disputed
 21 technology more "desirable" because it is "robust against a range of adverse events that might occur" and
 22 "is crucial to the value of the software in an enterprise setting." (Chase Report ¶ 102 (Dkt. No. 296-3 at
 23 61).) Microsoft's expert agrees with that characterization. (Nutt Dep. 145:5–7 (Dkt. No. 296-4 at 41).
 24 Accordingly, the Court will not dismiss the copyright claim on *de minimis* grounds.

25 ii. Substantial Similarity

26 Finding no reason at this stage to filter out any of the allegedly infringed material as non-
 27 protected, the Court must consider whether Microsoft infringed Veritas' copyrighted LDM code by
 28 copying it in LVM. "[P]roof of infringement involves fact-based showings that the defendant had 'access'
 29 to the plaintiff's work and that the two works are 'substantially similar.'" *Three Boys Music Corp. v.*

1 Bolton, 212 F.3d 477, 481 (9th Cir. 2000), *cert. denied*, 531 U.S. 1126 (2000) (quoting *Smith v.*
 2 *Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996)). In the instant case, it is undisputed that Microsoft had
 3 access to Veritas' LDM source code. (Def.'s Contract Mot. 2 (Dkt. No. 210 at 3); Compl. ¶ 18 (Dkt.
 4 No. 1 at 7).) "Where a high degree of access is shown, [the Ninth Circuit] require[s] a lower standard of
 5 proof of substantial similarity." *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004). Accordingly,
 6 Veritas' burden of proof of substantial similarity is lowered.

7 The Ninth Circuit has explained that:

8 In determining whether two works are substantially similar, we employ a two-part
 9 analysis: an objective extrinsic test and a subjective intrinsic test. For the purposes of
 10 summary judgment, only the extrinsic test is important because the subjective question of
 11 whether works are intrinsically similar must be left for the jury. . . . The extrinsic test
 12 considers whether two works share a similarity of ideas and expression as measured by
 13 external, objective criteria. . . . The extrinsic test requires analytical dissection of a work
 14 and expert testimony.

15 *Id.* at 845 (internal citations omitted). The Court may find that Veritas has satisfied the extrinsic test if it
 16 has provided "indicia of a sufficient disagreement concerning the substantial similarity of the two works."
 17 *Id.* at 846 (internal citation and brackets omitted).

18 Microsoft posits that Veritas has "offered no evidence at all—let alone expert testimony—to
 19 substantiate its copyright infringement claim." (Def.'s Mot. 29 (Dkt. No. 212 at 30).) The Court
 20 disagrees. Veritas' expert Dr. Chase opined, after analyzing the code sections at issue, that:

21 The transaction macro code in the Microsoft LVM code (Build 5245) is nearly identical in
 22 syntax, code sequence and structure compared to the transaction macro code in the
 23 Veritas LDM code. The macro definition and usage are idiosyncratic, so it is unlikely that
 24 this occurred by chance. On further analysis of earlier versions of the source code (in
 25 MSM-VRTS 030) shortly after the macros were introduced in change version 025706
 26 dated 10/4/2001, it becomes apparent that these transaction macros were copied from the
 27 Veritas code with very minor changes. The more significant differences in the LVM
 28 transaction macros were introduced much later in change version 124809 dated
 29 12/8/2004, and were related to the disk quorum recovery scheme that Microsoft
 30 introduced into LVM.

31 (Chase Report ¶ 121 (296-3 at 70).) Further, Microsoft's expert Dr. Nutt stated that the changes to the
 32 transaction code from LDM to LVM were "not major." (Nutt. Dep. 116:2–3 (Dkt. No. 296-4 at 28).)

1 Dr. Nutt identified similarities between the two sets of code, including:

2 the same basic structure. They are both macros that start out #define, it's a programming
 3 language construct. They then interloop in the two macros and do search and work. In the
 4 LVM case there is an explicit allocation of the abort variable. There is in both. There is a
 half of a loop

5 (*Id.* at 117:13–24.) Bearing in mind Veritas' lowered burden of proof given Microsoft's high degree of
 6 access, the Court is persuaded that Veritas has satisfied the extrinsic test to survive summary judgment.

7 **F. Whether Veritas' Trade Secret Misappropriation Claim, Claim for Breach of the
 8 Duty of Good Faith and Fair Dealing, or Copyright Claim is Barred by the Three-
 9 Year Statute of Limitations and the Related Equitable Doctrines of Estoppel,
 10 Waiver, and Laches**

11 Microsoft argues that Veritas' claims for misappropriation, breach of the duty of good faith and
 12 fair dealing, and copyright infringement are untimely⁷ because “undisputed evidence shows that Veritas
 13 knew or should have known of Microsoft's now-accused activities many years before filing suit[.]”
 14 (Def.'s Mot. 15 (Dkt. No. 212 at 16).) Specifically, Microsoft asserts that Veritas should have known by
 15 Spring 2000 that Microsoft intended to “reintegrate LDM in a way that retained Veritas' ‘IP.’” (*Id.* at
 16 17.) Additionally, according to Microsoft, Veritas should have known by 2001 all of the facts giving rise
 17 to Veritas' misappropriation claims relating to VDS and VSS. (*Id.* at 18–19.) Microsoft also argues that
 18 Veritas should have known of any copyright infringement in 2000, “when Microsoft first informed
 19 Veritas that Microsoft was creating a new version of the volume manger using LDM code.” (Def.'s Mot.
 20 30 (Dkt. No. 212 at 31).) Veritas filed this lawsuit on May 18, 2006. (Compl. (Dkt. No. 1).)

21 The Court finds that Veritas has raised sufficient evidence to survive summary judgment on all of

22 ⁷ Trade secret misappropriation claims must be brought “within three years after the
 23 misappropriation is discovered or by the exercise of reasonable diligence should have been discovered.”
 24 WASH. REV. CODE § 19.108.060. Likewise, a three-year limitations period applies to claims for breach of
 25 the duty of good faith and fair dealing. *See Steinberg v. Seattle-First Nat'l Bank*, 832 P.2d 124, 125 n.4
 (Wash. Ct. App. 1992). Additionally, claims for copyright infringement must be brought within three
 years after the claim accrued. 17 U.S.C. § 507(b). Accrual begins when a potential plaintiff “has
 knowledge of a violation or is chargeable with such knowledge.” *Roley v. New World Pictures, Ltd.*, 19
 F.3d 479, 481 (9th Cir. 1994).

1 the timeliness issues. Veritas' Complaint and Response tell the story of a ten-year disintegrating business
 2 relationship, involving years of alleged deception and obfuscation of the true facts. According to Veritas,
 3 it did not discover, and could not have discovered, any of Microsoft's improper conduct until after it
 4 received the latest version of Microsoft's Windows operating system code at WinHEC in early 2004.
 5 (Compl. ¶ 27 (Dkt. No. 1).) Even then, Microsoft allegedly denied Veritas access to the Vista source
 6 code that would have allowed Veritas to confirm its concerns that Vista included code implementing
 7 ostensibly reserved features in violation of Microsoft's contractual obligations regarding Veritas'
 8 confidential information. (*Id.* at ¶ 31.) It was not until October 2004 that Microsoft gave Veritas a
 9 version of the Vista volume management source code (LVM) that, according to Veritas, confirmed for
 10 Veritas the extent of Microsoft's misconduct. (*Id.* at ¶ 32.)

11 Veritas supports its version of the facts with evidence including a December 31, 2004, email from
 12 Veritas' Vice President of Intellectual Property, Joseph Fitzgerald, to Microsoft's Craig Fielden,
 13 indicating that in spite of Veritas' understanding that Microsoft was to give Veritas periodic, quarterly
 14 code updates, Microsoft delayed giving Veritas the LVM code for approximately 18 months, until after
 15 much discussion, negotiations, and numerous letters. (Dkt. No. 296-6 at 52.) Mr. Felden's email
 16 indicates that Veritas did not receive the LVM code until sometime near the end of 2004. Veritas explains
 17 in its Response that access to the LVM code was necessary for determining whether LVM contains any
 18 code or trade secrets from LDM. (Pl.'s Resp. 19 (Dkt. No. 289 at 25).) In fact, Microsoft's own answer
 19 to Veritas' Interrogatory Number 6⁸ indicates that "a definitive answer to [the question of how much
 20 LDM code was used to develop LVM] can be provided only after making a line-by-line comparison of
 21 LDM and LVM code." (Microsoft's Second Supplemental Resp. to Veritas' Interrog. No. 6 (Dkt. No.

22
 23 ⁸ Interrogatory Number 6 asks Microsoft to "[i]dentify any and all source code and source code
 24 sections from LDM that remain a part of, are in some way included in, or that were relied upon or
 25 utilized by Microsoft in the development of, LVM, VDS and/or VSS." (Microsoft's Second
 Supplemental Resp. to Veritas' Interrog. No. 6 (Dkt. No. 296-6 at 38).)

1 296-6 at 44.) If Veritas did not receive the LVM code until near the end of 2004, Veritas could not
 2 reasonably have been aware of its potential claims until that time.

3 Microsoft identifies allegedly undisputed material facts to show that:

4 Veritas knew, in the spring of 2000, everything it needed to know to file its LVM-based
 5 claims, including that (1) Microsoft intended to develop the next version of the Embedded
 6 Product using developers who had been exposed to LDM source code, and was taking
 7 responsibility for implementing large numbers of bug fixes and other modifications
 designed to eliminate the many problems that plagued the original Embedded Product, and
 (2) this project necessarily required the use of the LDM source code on which the original
 Embedded Product was based.

8 (Def.'s Mot. 16 (Dkt. No. 212 at 17).) However, one of the main issues in this case is whether Microsoft
 9 merely developed an improved Embedded Product, or whether it actually created a Supplanting Product,
 10 and whether the developments Microsoft performed were just bug fixes and other modifications designed
 11 to eliminate problems.

12 It is not clear to the Court that communications between Microsoft and Veritas were sufficiently
 13 explicit to give Veritas reason for concern that its confidential information was being misused. The
 14 exhibits Microsoft puts forward to show that there were problems with LDM during the 1997–1999 time
 15 period are not sufficient to prove as a matter of law that Veritas should have known the extent to which
 16 Microsoft was going to change or supplant the Embedded Product. (Def.'s Mot. 16 n.12 (Dkt. No. 212
 17 at 17).) Further, Microsoft developer Catherine Van Ingen's May 16, 2002, email to Veritas' Peter
 18 Benoit characterizes Microsoft's planned developments as a "reintegration" of the Embedded Product, a
 19 "re-engineering to improve such things as PNP interactions." (Van Ingen Email (Dkt. No. 213-5 at 20).)
 20 The email specifically states that the planned "reintegration is not a rewrite[.]" (*Id.*) This communication
 21 does not suggest to the Court that Veritas should have known Microsoft was creating a Supplanting
 22 Product, or that it was using Veritas' confidential information to do so.

23 Microsoft points also to Frank Artale's deposition testimony that Veritas received regular updates
 24 on the reintegration from Peter Benoit, based on his conversations with Van Ingen. (Def.'s Mot. 17 (Dkt.
 25 No. 212 at 18).) However, if Peter Benoit was not receiving full disclosure from Van Ingen about the
 26 ORDER – 18

1 extent of the “reintegration,” then whether or not Mr. Benoit gave Veritas regular updates is immaterial.

2 Moreover, Veritas alleges that Microsoft concealed its plans to compete with Veritas’ Add-on
 3 Products by developing the various VDS/VSS components in secrecy and by releasing them at different
 4 points in time, while withholding from Veritas key design specifications and source code files. (Pl.’s
 5 Resp. 20 (Dkt. No. 289 at 26).) Specifically, Veritas alleges that Microsoft concealed the critical user
 6 interface (or GUI, or UI or MMC) component of VDS/VSS. (*Id.* at 21.) Veritas alleges that Microsoft
 7 represented to Veritas that the VDS/VSS technology under development would be limited to an API,
 8 while it secretly developed the user interface under the codename “Doppler” in order to compete with
 9 Veritas’ Add-on Products, including SANPoint Control. (Pl.’s Resp. 21 (Dkt. No. 289 at 27).) Veritas
 10 supports these contentions in part with a Microsoft internal document dated November 5, 2002, that
 11 describes VDS specifications and explicitly states that “Competition” includes “Veritas
 12 SANPointControl.” (Virtual Disk Service Requirements Specification 7 (Dkt. No. 293-2 at 8).)

13 Microsoft argues that Veritas knew or should have known all the facts giving rise to its claims
 14 relating to VDS by 2001, in part because in 1999 Veritas obtained an 86-page VDS specifications
 15 document, which allegedly provided Veritas with in-depth knowledge of the purpose, functionality,
 16 structure, and source code of VDS. (Def.’s Mot. 18 (Dkt. No. 212 at 19).) However, Veritas counters
 17 that this document at most involved only an early, unsuccessful, and later abandoned, API prototype, and
 18 did not reveal the actual design plans and code for the VDS/VSS framework. (Pl.’s Mot. 22 (Dkt. No.
 19 289 at 28).) Additionally, Microsoft argues that Veritas received a VDS software development kit in May
 20 2002 (Def.’s Mot. 18 n.15 (Dkt. No. 212 at 19).) However, Veritas argues that the “so-called ‘software
 21 developer kits’ or ‘code files’ that Microsoft identifies for VDS/VSS, at most, were incomplete and
 22 misleading pieces of the entire VDS/VSS framework and did not contain any reference to the secret user
 23 interface component[.]” (Pl.’s Resp. 22–23 (Dkt. No. 289 at 28–29).) Veritas also argues that Microsoft
 24 never shared with Veritas the entire source code and design documents for the VSS/VDS framework,
 25 and cites an 2002 email from Eric Burgener summarizing Veritas’ source code access concerns. (Dkt.

1 No. 293 at 4.)

2 Reviewing the evidence the parties have put forward at this stage, the Court is not persuaded that
 3 there are no genuine issues of material fact as to what Veritas knew, and when. Whether Veritas could
 4 have discovered before 2004 Microsoft's misconduct in developing LVM and VSS/VDS is an intensely
 5 disputed factual issue that is properly left for the jury to decide. Likewise, the Court will not now hold
 6 laches, estoppel, or waiver to apply to Veritas' claims. For laches to apply, Microsoft must show that
 7 Veritas had "knowledge or reasonable opportunity to discover . . . that [it] has a cause of action against
 8 [Microsoft]." *Buell v. City of Bremerton*, 495 P.2d 1358, 1361 (Wash. 1972). For the reasons described
 9 above, the Court is not persuaded at this time that Veritas had such reasonable opportunity to discover its
 10 causes of action until 2004. Further, without reason to know that Microsoft may have been violating the
 11 Agreement before 2004, Veritas could not have "intentionally and voluntarily relinquished a known right"
 12 such that waiver might apply. *Jones v. Best*, 950 P.2d 1, 6 (Wash. 1998). Moreover, Microsoft has not
 13 proven at this stage that Veritas made an admission, statement, or act that was inconsistent with its
 14 present claims such that equitable estoppel should apply. *Carillo v. City of Ocean Shores*, 94 P.3d 961,
 15 970 (Wash. Ct. App. 2004) (stating that "[e]quitabile estoppel is not favored, and the party asserting
 16 estoppel must prove each of its elements by clear, cogent, and convincing evidence."). The Court will not
 17 hold Veritas equitably estopped from asserting its claims merely because of statements it made about
 18 marketing or endorsing the anticipated product before it had access to the product's code and
 19 documentation. Accordingly, the Court DENIES Microsoft's motion to the extent that it seeks to bar
 20 Veritas' claims on timeliness issues.

21 **IV. CONCLUSION**

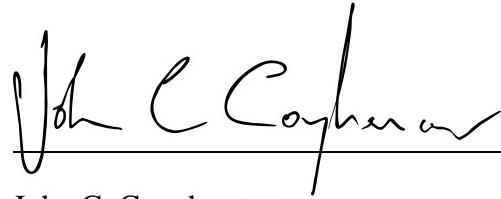
22 For the foregoing reasons, as to Defendant Microsoft Corporation's Motion for Summary
 23 Judgment on Counts I, III–V, VII (Dkt. No. 212), the Court hereby:

24 DENIES IN PART the motion as to Veritas' claims of trade secret misappropriation, breach of
 25 the duty of good faith and fair dealing, and copyright infringement; and
 26 ORDER – 20

1 GRANTS IN PART the motion insofar as Veritas' claims of unfair competition and unjust
2 enrichment are hereby DISMISSED.

3 DATED this 4th day of February, 2008.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE